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Supreme Court of the United States

OCTOBER TERM, 1994

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER, and OHIO SENATOR RICHARD T. FINAN,

Petitioners,

—v.—

VINCENT J. PINETTE, DONNIE A. CARR, and KNIGHTS OF THE KU KLUX KLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI*

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of Jews. It has filed numerous briefs *amicus curiae* in cases involving the Establishment Clause. In recent years it has on many occasions addressed the public display of religious symbols and the relationship between the Establishment Clause and the public forum doctrine.

* * *

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudices in the United States. ADL has always adhered to the principle that these goals and indeed the general stability of our democracy are best served through the separation of church and state and the preservation of the fundamental right to free exercise of religion.

In support of these principles, ADL has previously filed briefs before this Court in such cases as *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), *Board of Trustees v. McCreary*, 471 U.S. 83 (1985), and *Lynch v. Donnelly*, 465 U.S. 668 (1984). As a result of its longstanding commitment to the principles set forth above, ADL is able to bring to the issues raised in this appeal the perspective of a national organization dedicated to safeguarding the religious freedoms of all Americans. ADL submits this brief because it believes this case raises serious questions regarding government endorsement of religion in contravention of the Establishment Clause of the First Amendment.

* * *

The brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

A. If the cross is permitted to stand unattended on the Capitol Square, closely facing the edifice that is the seat of government, the scene will invite observers to believe that the State endorses the message conveyed by the religious symbol. The case does not differ in principle from *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 600 (1989), where the Court forbade the placement of a crèche in a county seat of government, finding that in permitting that arrangement "the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message." This case is *a fortiori*; the Court is not itself asked to prohibit the display but only to rule that the State is empowered to prevent such a use of its Capitol Square and Statehouse as a means of avoiding a clash with the Establishment Clause.

The mute power of symbols, and the emotions they evoke, is a matter of familiar experience. Against the demand to join the religious symbol with the public square, the State of Ohio is entitled to act upon the constitutional judgment that "the symbolic union of church and state . . . is . . . likely to be perceived by adherents of the controlling denomination[ ] as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Grand Rapids Sch. District v. Ball*, 473 U.S. 373, 390 (1985). These perceptions correspond precisely to the reasons why the Klansmen demand, and others, along with the State, oppose the setting of the public square for the cross. In the case of the Klan, the tension is specially heightened given that organization's history of militant, not seldom violent, nativist hostility to minority religions as well as unsympathetic Protestant denominations.

The complex picture before the Court presents a diversity of concerns, sometimes superficially contradictory but all pointing in the

end to the soundness of Ohio's judgment disallowing the cross on Capitol Square. That the cross is the symbol of the majority religion evokes a reminder of the special role of the Religion Clauses as protectors of minorities. At the same time, the recent stream of cases involving menorahs recalls that Jews, like Christians, divide sharply over the suitability of having *their* religious symbols favored by a public site as against the constitutional barrier that forbids intermingling religious power with the power of secular government. The opponents of the joinder, whatever their religious faiths, are on the solid ground of the Establishment Clause.

B. The particular character and force of religious messages that would be steadily conveyed and supported by symbols standing alone on the public square comprise a compelling state interest in avoiding a violation of the Establishment Clause. The message of the symbol, though it is protected expression, differs vitally from a live speaker. The speaker speaks for himself or herself. The religious symbol, planted alone on the government's site, carries the clear impression that it would not be there but for the favor or approval of the government "owner." This message is not altered simply because the square has been host to a wide variety of speakers. A substantial percentage of the audience viewing the symbol will be unfamiliar with this history and the legal niceties of Free Speech doctrine. The Establishment Clause protects against unintended appearances of endorsement as well as the kind of purposeful support for religion found in *Stone v. Graham*, 449 U.S. 39 (1980). This case should be resolved in favor of the State's judgment to disallow placement of the religious symbol on the public square.

ARGUMENT

THE STATE COULD PROPERLY FIND THAT AN UNATTENDED RELIGIOUS SYMBOL ON THE STATE'S CAPITOL SQUARE, AT THE SEAT OF GOVERNMENT, WOULD BESPEAK ENDORSEMENT OF THE SYMBOLIZED RELIGION AND VIOLATE THE ESTABLISHMENT CLAUSE

A.

The Symbol on the Public Square Implies Public Favor or Endorsement

What Justice Holmes said of a word is no less true of a non-verbal symbol: it "may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918). Unlike a live speaker, an unattended symbol placed on the public land, especially where it is at the seat of government, and standing there expressing its mute message steadily for days or weeks on end, gives rise to a likely, if not an inevitable, inference that the message is one viewed with favor by the state authority on whose land the symbol stands. Judicial and other observers over the years have given repeated testimony to the likelihood and the reasonableness of this inference.

The Supreme Court of Oregon made the point 25 years ago:

> The employment of publicly owned and publicly maintained property for a highly visible display of the character of the cross in this case necessarily permits an inference of official endorsement of the general religious beliefs which underlie that symbol.

Lowe v. City of Eugene, 463 P.2d 360, 363 (1969), *cert. denied*, 397 U.S. 1042 (1970).[1] It is not necessary, of course, for the state to argue that the inference must "necessarily" be permitted, as the Oregon court indicated; it is sufficient, as we will emphasize again, that a "reasonable observer" might draw the inference, or, indeed, that *some portion* of the reasonable observers in the community might so infer.

In circumstances that vary only with respect to essentially unimportant details, the point has been made repeatedly in opinions of this Court and other courts. In *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 599-600 (1989), speaking of a crèche that had been placed in a building that was "the seat of county government," this Court said:

> No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the "display of the crèche in this particular physical setting," the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message.

(Citation and footnote omitted.)

In 1983, in a case that led to an equal division in this Court, District Judge Stewart spoke of the message conveyed by a crèche placed on a public circle which was not, as in this case, the seat of government:

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[1] Some years later, the cross having been approved by city voters as an American Legion-sponsored "Veterans War Memorial Cross," the Oregon Court (4-3) allowed its maintenance on city property along with an explanatory plaque. *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338 (1976), *cert. denied*, 434 U.S. 876 (1977).

> [W]hen a symbol is implanted on public land that land uniquely becomes the message bearer, and because, concomitantly, there are no persons present to whom the receiver of the religious message can attribute the speech, the possibility that those receiving the message will assume it is supported by the state is particularly present.

McCreary v. Stone, 575 F. Supp. 1112, 1131 (S.D.N.Y. 1983), *rev'd*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court sub nom. Board of Trustees v. McCreary*, 471 U.S. 83 (1985).

Similarly, following this Court's lead in *Allegheny*, the Fourth Circuit ruled as follows with respect to a crèche situated on the front lawn of a county office building:

> Absent any contrary indication, the unmistakable message conveyed is one of government endorsement of religion - impermissible under the Establishment Clause of the Constitution.

Smith v. County of Albemarle, 895 F.2d 953, 958 (4th Cir.), *cert. denied*, 498 U.S. 823 (1990).

Whatever may be true of a park or a street distant from the seat of government, the inference of government endorsement is strong and powerfully reasonable when the religious symbol is emplaced in the public square immediately fronting the seat of government. Where, as here, the proposed identification of the site with the government authority is not debatable, there is a compelling case that the state is empowered, if not bound, to avoid the appearance of government favoritism for (or opposition to) a religion. The Second Circuit, undertaking to follow and implement this Court's teachings in the *Allegheny* case, has reflected the sound position that the sensitive interests protected by the Establishment Clause are not to be risked or measured by geographic subtleties putting borders around the impact of apparent government endorsement.

> [E]very square foot of the Park is linked to the seat of municipal government, and any attempt to carve the Park into areas that do or do not have a direct view of City Hall is therefore meaningless for purposes of the Establishment Clause.

Chabad-Lubavitch of Vermont v. City of Burlington, 936 F.2d 109, 112 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992). In any event, refined distinctions could have no place in the circumstances of the present case. The cross in question was intended to stand, and ordered by the lower courts to stand, directly confronting the broad facade of the Ohio Statehouse (J.A. 62, 63, 97).

This case may be less patently compelling perhaps than the situation in *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987), which concerned a crèche placed inside the City Hall. There, the court said:

> Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorses Christianity.

Id. at 128. While giving "house room" to the religious symbol is perhaps the clearest case, the clash with the Establishment Clause remains plain enough, it is submitted, when the government allows the symbol to be placed on its front lawn. That is precisely the case of *Albemarle*, 895 F.2d at 958, where the court found the Establishment Clause to *forbid* (not merely permit officials to disallow) a crèche "situated on the front lawn of the County Office Building . . . ." This is also the case now before the Court. For both proponents and opponents of the Klan's cross, the issue is the appearance of association with the power and prestige of government,

and the resulting benefit to the religious display and the sentiments the display symbolizes.

The critical question in every case is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985).

The so-called disclaimer attached to the cross in the Capitol Square is a trivial detail that should have no measurable impact on the issues in the case.[2] The paper itself seems to flap in the breeze and to curl up so that it is only partially legible at any given time (J.A. 62, 63). Beyond that, the statement that the cross "was erected by private individuals without government support" (J.A. 100) does not distinguish it from other privately financed structures and symbols to be found in public places and parks around the Nation where, characteristically, people are led to find the association with the public land a mark of approval by the government for the subject or person memorialized. Both those who love and those who hate particular symbols in public places, without regard to the special question of religion, focus on the association between the public owner of the land and the idea or thing symbolized. No matter who pays for it, the Confederate flag flown from a state building in the South wins the approval of some and the hostility of others, depending on the ideas and the history symbolized. *See, e.g., NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990) (constitutional challenge to Confederate flag flown above Alabama state capitol); *Holmes v. Wallace*, 407 F. Supp. 493 (M.D. Ala.), *aff'd mem.*, 540 F.2d 1083 (5th Cir. 1976) (same); *Smith v. St. Tammany Parish Sch.*

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[2] In *Stone v. Graham*, 449 U.S. 39 (1980), this Court held unconstitutional the posting of copies of the Ten Commandments on the walls of public classrooms even though the copies were purchased with private contributions.

Bd., 316 F. Supp. 1174 (E.D.La. 1970) (ordering removal of Confederate battle flags from local school system); *aff'd*, 448 F.2d 414 (5th Cir. 1971). *See also* Tony Horwitz, *Rebel-Flag Battle Opens Old Wounds, Builds New Alliances*, Wall St. J., Feb. 10, 1995, at A1.

Other circuits, like the court below and the Eleventh Circuit in *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (en banc), have disagreed with the inference perceived by the Second, Fourth, and Seventh Circuits. The issue thus presented is not a species of factual contest among judges to see which come closest to representing the "reasonable observer" in whose judgment the question is to be tested. The problem is, rather, at most a mixed question of law and fact, where the judgment of constitutional law ultimately is for the courts, and in the end this Court, to resolve. *Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring) ("[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.").

The solution lies in an analysis of the interests at stake, both of those seeking the use of the public square and of those resisting, in light of the familiar, though sometimes difficult, principles of the Establishment Clause. It is pertinent to begin with the sponsors of the Klan cross and *their* motivations in desiring the Capitol Square as the situs of that display. Granted that the site is a prominent one, there is little or no doubt that a prime motivation for seeking that place for the planting of the cross is its close association with government and the power of government.[3] Like Justice Holmes and

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[3] The common expression referring to the speaker who "wraps himself in the flag" makes in a homely way the point that ought to run through the consideration (continued...)

the courts in repeated instances, these sponsors surely recognize that their symbol takes color, including the color of authority, from being associated closely with government by its placement. *Spence v. Washington*, 418 U.S. 405, 410 (1974) ("the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol").

There is then the concern of those who oppose the siting of the cross on Capitol Square. These include, surely, members of religions other than Christianity or of no religion at all who see in the cross both the most fundamental symbol of Christian inclusion and the corresponding symbol of non-Christian exclusion. *See County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 626 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (crèche in courthouse "conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community"); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 n.3 (7th Cir. 1987) (citing testimony of Jewish plaintiff who stated that message he perceived from crèche display was that "'as a non-Christian I am an outsider in the political community who is merely tolerated,'" and "'[e]very time I see the crèche prominently displayed in City Hall, I feel personally diminished by its presence'"). Also included among the opponents are Christian proponents of the Establishment Clause, strongly construed, who see the association of Church and State as inimical to the interests of everyone, whether Christian or not. *See, e.g., Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (en banc); *Smith v.*

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[3](...continued)
of this entire problem. Whether "wrapped in" or merely resting upon the symbol or place that reflects the state owner's authority, the association is meant to achieve the kind of benefit that religion is forbidden to have from government under the mandate of the Establishment Clause.

County of Albemarle, 895 F.2d 953, 954 (4th Cir.) (plaintiffs include six Christian or Unitarian ministers), *cert. denied*, 498 U.S. 823 (1990); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1025 (2d Cir. 1989) (including minister plaintiff), *cert. denied*, 496 U.S. 926 (1990).

What emerges from this clash is that both proponents and opponents associate the symbol with its geographic placement, deriving either comfort or dismay from the support of the religious symbol by the governmental site.

In considering the opposed positions, it is fair and pertinent to note that in the present case, as in most cases of this kind, the Court's concern is with the majority religion and the protests come from members of minority religions or none at all. This is a matter of some significance, though by no means decisive, when we keep in mind that the essential office of the First Amendment Religion Clauses has been generally to protect the interests of minorities against majority desires and sentiments.

To be sure, this majority-minority analysis is limited. In recent years at least, a number of the cases have involved efforts to place, or the placement of, menorahs in public places. *See, e.g.*, *Allegheny*, 492 U.S. at 573; *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383; *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160 (6th Cir. 1993); *Americans United*, 980 F.2d at 1538; *Chabad-Lubavitch of Vermont v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992); *Kaplan*, 891 F.2d at 1025; *Lubavitch of Iowa, Inc. v. Walters*, 684 F. Supp. 610 (S.D. Iowa 1988), *aff'd*, 873 F.2d 1161 (8th Cir. 1989). The menorah sponsors have among their opponents Jewish organizations that see the intermingling of religion and government as a threat to the interests protected by the First Amendment. Thus, Jewish organizations appear with some frequency in opposition to the placing of menorahs in public places. *See, e.g.*, *Allegheny*, 492 U.S. at 651 & n.9 ("In this very suit, members of the Jewish faith firmly

opposed the use to which the menorah was put . . . ."); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d at 1163-64 (discussing views in opposition to menorah display expressed by amicus curiae Jewish Community Relations Council and American Jewish Congress); *Lubavitch of Iowa*, 684 F. Supp. at 615 n.5 (opposition of various Jewish groups to display of menorah on Capitol grounds).

The complexities of these divergent and varying interests underscore the difficulty of the problem. In the end, however, even these internecine disputes tend to buttress the position of those opposing religious symbols in public places, especially at the seat of government. The quarrels exemplify the bitterness of the conflicts that arise over attempts to associate or intermingle government and religion. More specifically, they add to the showing of compelling interest that prompts authorities like the government of Ohio to deny a public site for a religious symbol in order to avoid a collision with the Establishment Clause.[4]

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[4] *See Allegheny*, 492 U.S. at 650-51 (Stevens, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part):

> [T]he Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property. There is always a risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful. Some devout Christians believe that the creche should be placed only in reverential settings, such as a church or perhaps a private home; they do not countenance its use as an aid to commercialization of Christ's birthday. Cf. *Lynch*, 465 U.S., at 726-727 (Blackmun, J., dissenting). In this very suit, members of the Jewish faith firmly opposed the use to which the menorah was put by the particular sect that sponsored the display at Pittsburgh's City-County Building. Even though "[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even turn their backs," see *post*, at 664 (Kennedy, J., concurring in judgment in part and dissenting in part), displays of this kind inevitably have a greater

(continued...)

This case may in some sense seem peculiar in that the proponent of the cross is the Ku Klux Klan, a group that is hardly a part of the contemporary "establishment" or likely at first blush to represent a danger of apparent collaboration between religion and government. Upon further reflection, however, this superficial appearance is seen to be deceptive. The primary concern is with the cross, a symbol of Christianity, not merely the Ku Klux Klan, which chooses to exploit it. Moreover, the history is by no means ancient of times when the Ku Klux Klan, notably in Ohio, could claim almost 400,000 members and "it seemed that the mask and hood had become the official symbol of the Buckeye state." David M. Chalmers, *Hooded Americanism* 175 (1987). For Blacks, Jews, and other Klan targets, the association of the Klan's cross with government is a source of specially heightened concern. The familiar history is of a "hydra-headed monster that espoused white supremacy, anti-Catholicism, anti-Semitism, fraternalism, nativism, and a return to moral order." William D. Jenkins, *Steel Valley Klan: The Ku Klux Klan in Ohio's Mahoning Valley* 159 (1990). As a central corollary, in Ohio among other states, with a background of violence and threatened violence, there has been a militant strain of Klan-style Protestant morality, pitted against other religions, including differing Protestants. *Id.* at 160-61, 163, 164-65.

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[4](...continued)
tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The Establishment Clause does not allow the public bodies to foment such disagreement.

(Footnotes omitted.)

B.

Though Symbols Are Protected as "Speech," Their Impersonal Force on The Public Square Creates a Special and Compelling Interest in Avoiding Establishment Clause Violations

Along with the courts below, we assume without doubt that had the respondent Klan's members wished, with the cross at their side, to conduct a rally, deliver speeches, distribute leaflets, or otherwise participate personally in expressive conduct, the Establishment Clause would not stand in their way. Indeed, the record reflects that the Klan has been allowed to demonstrate on Capitol Square (J.A. 34-5).

As we have shown above, however, there is a crucial difference between speech by live speakers and religious symbols emplaced with no attendant speakers on the public square. Unlike the expressions of speakers, the display of an "unattended, solitary semi-permanent symbol" on the public square "in the absence of a live speaker to whom responsibility could be attributed," causes the governmental owner of the site to be "perceived as fulfilling the role of sponsor." *Kaplan v. City of Burlington*, 891 F.2d 1024, 1030 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). That appearance of governmental sponsorship is a matter of decisive consequence in enforcing the protections of the Establishment Clause.

The power of symbols is a familiar subject of law and literature. *See* F.W. Dillistone, *The Power of Symbols in Religion and Culture* 2-15, 99-147 (1986). Moreover, the force of the religious symbol serves both to unite and divide. For Christians the cross symbolizes "the crucifixion and death of Jesus at Calvary", and is "linked to the mystery of creation as well as to the mystery of redemption . . . ." 4 Encyclopedia of Religion, *Cross*, 163 (Mircea Eliade ed. in chief, 1987). It also symbolizes "the end of Judaism." *Id.* at 163. Conveyed by a symbol, these stark messages are capable of arousing passions more potently emotional than comparable thoughts conveyed by words. Touching this reality, this Court has spoken of an

important symbol as "a short cut from mind to mind." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

Given the powerful and potentially inflammatory impact of religious symbols, the State is entitled, even if it is not required, to take measures against the appearance of endorsing one religion or another in involvement with the passionate issues generated by differing religious beliefs. The private right to exhibit religious symbols must be safeguarded in accordance with the Free Speech as well as the Free Exercise Clause. The corollary protection against the threat of a religiously partisan government justifies equally the State's careful disassociation from such symbols of any faith.

This conclusion is not weakened by the history of speech-making and other forms of expression on the Capitol Square. The Establishment Clause is violated if "irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring). The fact that the Capitol Square has been the site of past demonstrations or speeches will not dilute the appearance of state endorsement to the great number of people who are not intimately familiar with its past history or the legal niceties of First Amendment free speech doctrine. This observer may be "a passer-through or a passer-by." *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (en banc) (Lively, J., dissenting). This observer will or may "draw his or her conclusions from the vista presented *at the time*." *Id.* (emphasis in original). Seeing the stark juxtaposition of the cross on the public square and the Capitol, such observers "do not have or will not seek access to . . . evidence of intent" but "will rely instead on the [symbols] themselves . . . ." *Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring). The result will be the very effect sought by the Klan and others from the brigading of the religious message with the authority of government through the placement of the unattended symbols at the seat of government.

The state's power to bar this result is not inconsistent with the Court's recent "equal access" decisions. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993); *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990); *Widmar v Vincent*, 454 U.S. 263 (1981). These cases all involved religious discussions, discourse, and speakers, with live and identifiable people as the messengers. None of them involved unattended symbols. Not a word in *Widmar*, *Mergens*, or *Lamb's Chapel* suggests that religious groups would have a right to place in the school's meeting facilities a plaque containing the Ten Commandments, *cf. Stone v. Graham*, 449 U.S. 39 (1980), a Nativity scene, a Buddhist wheel, a menorah, a crucifix, or any other kind of religious sign or symbol.

It seems apparent, in sum, that the question in this case, still open here, is essentially the question that led to the equal division in *Board of Trustees v. McCreary*, 471 U.S. 83 (1985). These amici submit that the question should be resolved in favor of the State's power to deny the appearance of endorsing one religion, or all religions, by disallowing unattended religious symbols to reside on the Capitol Square.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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